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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 571

LLOYD N. COBBLEDICK, INDIVIDUALLY AND AS VICE-PRESIDENT OF COBBLEDICK-KIBBE GLASS COMPANY, A CORPORATION, AND COBBLEDICK-KIBBE GLASS COMPANY, A CORPORATION,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

No. 572

A. H. BRAWNER, INDIVIDUALLY AND AS OFFICER AND DIRECTOR OF W. P. FULLER & CO., A CORPORATION, AND W. P. FULLER & CO., A CORPORATION,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

No. 573

EUGENE PALMUTH, INDIVIDUALLY AND AS PRESIDENT OF CROWE GLASS COMPANY, A CORPORATION, AND CROWE GLASS COMPANY, A CORPORATION,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FELIX T. SMITH,
CHALMERS G. GRAHAM,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Petition for writs of certiorari	1
Introductory statement	2
Opinions below	2
Jurisdiction	2
Question presented	2
Statute involved	2
Statement of the case	3
Specification of errors to be urged	3
Reasons for granting the petition	3
Conclusion	5

Table of Cases Cited.

Cogen v. *United States*, 278 U. S. 221	4
Cudahy Packing Co., In re, 104 F. (2d) 658	3, 4
Ellis v. *Interstate Commerce Commission*, 237 U. S. 434	4
Go-Bart Co. v. *United States*, 282 U. S. 344	4
Janssen v. *Belding-Corticelli*, 84 F. (2d) 577	4
Perlman v. *United States*, 247 U. S. 7	4

Statutes Cited.

Judicial Code, Section 128(a) (28 U. S. C. 225(a))	2, 3
Judicial Code, Section 240(a), as amended by the Act of February 13, 1925 (28 U. S. C. 347)	2

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray that writs of certiorari issue to review the judgments of the

United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled causes (R. 66), affirming the order (R. 33) of the District Court of the United States for the Northern District of California.

Introductory Statement

These three cases present identical questions; they were disposed of by the District Court in one ruling, and by the Circuit Court of Appeals in one opinion. The three records, page for page, are identical except for the difference in the names of the parties. Each record reference herein given therefore, refers to all three records.

Opinions Below

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 62) is not yet reported.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered November 28, 1939 (R. 66). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

Question Presented

The question presented is whether an order denying a motion to quash a subpoena *duces tecum* commanding a witness to appear and to produce papers in an inquisitorial proceeding before a grand jury is a final decision within the meaning of Section 128(a) of the Judicial Code.

Statute Involved

Section 128(a), Judicial Code (28 U. S. C. 225(a)):

> "The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions——

"First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

Statement of the Case

On November 2, 1939, a subpoena *duces tecum* was issued out of the District Court of the United States for the Northern District of California to each of the individual petitioners (R. 5). Each subpoena commanded the person named therein to produce certain papers before the Federal grand jury which was making an inquiry in said district into alleged violations of the anti-trust laws. Petitioners filed motions to quash the subpoenas on the grounds that the subpoenas were oppressive, unreasonable, and invalid, and in violation of petitioners' constitutional rights (R. 10). The District Court, after hearing, denied the motions; and separate appeals were taken to the Circuit Court of Appeals (R. 43). That court dismissed the appeals on the ground that the order appealed from in each case was not a "final decision" within the meaning of Section 128(a) of the Judicial Code (R. 62, 66).

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In holding that the order of the District Court is not a final decision within the meaning of Section 128(a) of the Judicial Code.

2. In dismissing the appeals from the order of the District Court.

Reasons for Granting the Petition

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In re Cudahy Packing Co.* (1939)

104 F. (2d) 658. The Court below admitted the conflict and expressly disapproved the *Cudahy* case, saying (R. 63):

> "The contrary holding, *In re Cudahy Packing Co.*, 2 Cir., 104 F. 2d 658, is clearly erroneous."

2. The decision of the Circuit Court of Appeals is erroneous and is inconsistent with prior decisions of this Court. The decisions of this Court establish that the test for determining whether an order denying a motion to quash a subpoena or to secure or to suppress evidence is appealable, is whether the order is merely interlocutory *in a pending case* or whether it terminates an *independent proceeding*. The same decisions establish that the order of the District Court in the case at bar is of the latter kind.

Go-Bart Co. v. *United States* (1931) 282 U. S. 344,356;
Cogen v. *United States* (1929) 278 U. S. 221;
Perlman v. *United States* (1918) 247 U. S. 7, 12-13;
Ellis v. *Interstate Commerce Commission* (1915) 237 U. S. 434, 442;
Janssen v. *Belding-Corticelli* (1936) 84 F. (2d) 577.

No indictment has been found or returned against petitioners. There is no other pending proceeding to which the proceeding in the case at bar "can be an incident or appendage" (*In re Cudahy Packing Co., supra*, p. 659). As this Court pointed out in *Perlman* v. *United States, supra*, p. 13, an order cannot be "interlocutory in a proceeding not yet brought and depending upon it to be brought."

The court below relied upon *Cogen* v. *United States, supra*. In that case this Court held that an order denying a motion for an order requiring the return of papers taken from the defendant without a warrant, and for the suppression of all evidence obtained therefrom, was not

a final judgment. The decision, however, was based upon the fact that the motion was filed in a "criminal case after the indictment" (278 U. S., p. 227), and that "In essence, the motion resembles others made before or during a trial to secure or to suppress evidence," and did not deal "with a matter distinct from the general subject of the litigation," (278 U. S., p. 223). The Court expressly distinguished orders such as the one involved in the case at bar (278 U. S., p. 225):

> "Motions for the return of papers and the suppression of evidence made in the cause in advance of the trial * * * must be differentiated from independent proceedings brought for a similar purpose. * * * The independent character of the summary proceedings is clear, * * * wherever the motion is filed before there is any indictment or information against the movant, * * *."

Conclusion

It is respectfully submitted that the petition for writs of certiorari should be granted.

Dated, December 6th, 1939.

Respectfully submitted,

FELIX T. SMITH,
CHALMERS G. GRAHAM,
Attorneys for Petitioners.